Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: 2434/2022

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
Applicant

and

TAFADZWA MUYAMBO 1st Respondent

INOQUE ZIEZIE MUCHANGA 2nd Respondent

In re: R 1 399 900.00 seized on 26 November 2021 and held under Kroonstad

CAS 398/11/2021

HEARD ON: 26 JANUARY 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI.

The date and time for the hand-down are deemed to be 08h30 on 8 February 2023.

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[1] This is an application brought by the National Director of Public Prosecutions (NDPP) for civil forfeiture under s 48(1) of the Prevention of Organised Crime Act 121 of 1998 (the Act). A preservation order in terms of s 38(2) of the Act was granted by Van Rhyn J on 2 June 2022 preserving the property being an amount of R1 399 900.00 seized by the South African Police Service under Kroonstad Cas 398/11/2021 and held under the effective control of the Station Commander of the Kroonstad Police Station.

[2] If a preservation order is in force, the NDPP may apply to the High Court for an order for the forfeiture of all or any of the property concerned.[1] The High Court shall make a forfeiture order applied for by the NDPP if it finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities.[2]

[3] The applicant is of the view that the property is both proceeds as well as an instrumentality of the contravention of illegal gold smuggling activities, money laundering as well as contravention of section 4(1)(b)(ii) read with section 1, 2, 4(2), 24, 25, 26(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (giving a benefit) and contraventions of the exchange control provisions, particularly section 3(1), section 10(1) of the Exchange Control regulations 1961, made under the Currency and Exchange Act 9 of 1933.

[4] The applicant's case is founded on the affidavits of Captain Daniel Motshoeneng, Warrant Office Charles Molefi and Nkosiphendule Mradla, a senior financial investigator attached to the assets forfeiture unit, Bloemfontein. The two policemen were on roadblock duties on 26 November 2021 at a vehicle checkpoint on the Kroonstad-Vredefort road when they noticed a VW Polo stopping 500m from the roadblock. They approached it, introduced themselves, asked the two male occupants to alight, searched the vehicle with

[1] Section 48.
[2] Section 50.

their consent and found a green carrier bag containing a Sasol Delight plastic containing sixteen (16) bundles of R 100.00 notes and a brown bag behind the front passenger seat which also contained bundles of R 100.00 notes. On enquiry from Captain Motshoeneng as to the origin of the money, the driver of the vehicle, the first respondent, said that they must talk. On being asked the reason for the talks, the respondents said that they got the property from the illegal sale of gold in Gauteng and that they earned a living by selling gold.

[5] The respondents answered in the negative when they were asked whether they had a licence to sell gold. They said that the total cash in the motor vehicle was R 1 500 000.00 and offered the policemen the amount of R 500 000.00 provided they set them free. Both respondents were placed under arrest for money laundering and bribery. Their rights were read to them and the property was seized.

[6] In opposition, the first respondent stated that he was a major shareholder and a director of Nyaboko Trading (Pty) Ltd, a company duly incorporated in terms of the Companies Act of Zimbabwe with its main place of business situated at Stand 17094, Damofalls Park, Zimbabwe. Although a citizen of Zimbabwe, he was resident with his family at Virginia, Free State, where he owned immovable property.

[7] On 6 November 2021, he, as a representative of Nyaboko Trading (Pty) Ltd (“Nyaboko”), entered into a memorandum of understanding with Atcofield (Pty) Ltd, a registered company in terms of the Company laws of the Republic of South Africa with its main place of business situated at 32 Van Buuren Road, Bedfordview, Gauteng, to promote a co-operative and mutually respectful relationship concerning transport and related services of diamond mining projects in the midlands of Zimbabwe. The purpose of the memorandum of understanding was to establish the terms and conditions under which the parties would function, whereby Atcofield would invest a sum of R 1 500 000.00

as operational capital in Nyaboko. Nyaboko's responsibilities were to receive the capital, use it to run the business and acquire trucks and trailers.[3]

[8] On the morning of 26 November 2021, he travelled to Parys, Free State, in order to fetch the R 1 500 000.00 due to the company as referred to in the memorandum of understanding. It was arranged between a certain Mr Oelofse, a director of Atcofield, and himself that a representative of Atcofield would meet him in Parys where the monies would be handed to him. He received the money from a certain Mr David Jacobus Nagel, a representative of Atcofield who resided at Plot 87, Lindley district, Lanseria, Gauteng.

[9] On his way back to Welkom, he gave a lift to the second respondent who was also on his way to Welkom. They were friends and resided in the same area of Welkom. He drove and stopped the vehicle next to the road to urinate when they were approached by police officers who immediately searched the vehicle without their permission. When the police found the money, which was not hidden, it was as if they had "*won the jackpot*". They immediately accused them of bribery and never gave them an opportunity to explain their lawful possession of the money. They were arrested and charged with corruption in the amount of R 500 000.00. The money was not sealed in their presence. He was surprised to learn that the money seized was only R1 399 000.00 and not R1 500 000.00. The only explanation is that the missing money was taken by the police officers.

[10] Mr Johan Oelofse filed a confirmatory affidavit in which he stated that he was a businessman and the director of Atcofield which was involved in the mining industry in Zimbabwe and had entered into business dealings with Nyaboko. He represented Atcofield when it entered into a memorandum of understanding on 6 November 2021. He knew the first respondent for the past five years as Nyaboko transported building material for his company to a mine in Gweru, Zimbabwe. He confirmed the contents of the first respondent's opposing affidavit and that Mr Nagel met the first respondent at Parys on the morning of

[3] Memorandum of Understanding, clauses 1 and 2.

26 November 2021 to hand over the amount of R 1 500 000.00 as stated in the memorandum of understanding. It was a term of the agreement in terms of the memorandum of understanding that the first respondent would utilise that amount for the acquisition of trucks/and or trailers to render a service to his company.

[11] A written acknowledgement of receipt dated 26 November 2021 and styled re: PAYOUT NYABOKO TRADING, T MUYAMBO, signed by JJ Oelofse as director of Atcofield and the first respondent as a director of Nyaboko Trading and the receiver, was annexed to the papers as annexure "TM7". It reads as follows:

"Johan Oelofse hereby certifies that an amount of R 1 500 000.00 (One million five hundred thousand rands) is hereby handed over to Tafadwa Muyambo, representative of Nyaboko Trading (Pty) Ltd as per the signed MOU dated 6 November 2021."

[12] The applicant contended that there was no need for the first respondent and a representative of Atcofield to meet in Parys to exchange such a huge amount of money in cash except to hide the illicit nature of the property, especially in a period when electronic banking is the order of the day. No legitimate business executive would travel in the darkness of the early hours of the morning to meet in a neutral venue in the middle of nowhere, without adequate protection and risk their lawfully acquired income.

[13] It was submitted that the first respondent, Oelofse, and David Nagel had the intention to contravene the foreign exchange control regulations without the consent of the National Treasury and received payment for goods outside the Republic of South Africa without the necessary exemption from the National Treasury. Furthermore, the respondents panicked when they noticed the police vehicle checkpoint on the Vredefort-Kroonstad road and brought their vehicle to a standstill, which made members of the police services suspicious and approached the vehicle.

[14] The respondents oppose the application on the basis that there is a genuine and bona fide dispute of fact due to the following main reasons:

1. On the discovery of the cash in the motor vehicle the police never indicated that they had a suspicion that the monies were stolen. The respondents were never warned of their constitutional rights before they allegedly divulged that the money was derived from illegal gold transactions. If the version of the police officers is correct, the respondents should have been warned of their constitutional rights before they were questioned in detail.

2. The respondents produced supporting documentation to corroborate that the money was lawfully received in terms of a valid memorandum of understanding from Atcofield (Pty) Ltd. The police officers only booked the amount of R 1 399 900.00 instead of R 1 500 000.00.

3. The charge sheet shows that the respondents are only charged under the Prevention and Combating of Crime Activities Act 12 of 2004 and no other charges alluded to by the applicant.

4. It is not illegal to be in possession of a large amount of cash and it was therefore unnecessary for the respondents to have offered monies to the police for their release.

[15] A preservation order is granted in terms of section 38(2) of the act if there are reasonable grounds to believe that the property concerned is an instrumentality of an offence or is the proceeds of unlawful activities. In *National Director of Public Prosecutions vs Mohammed & Others*[4] it was stated that:

"[17] Section 38 forms part of a complex, two-stage procedure whereby property which is the instrumentality of a criminal offence or the proceeds of unlawful activities is forfeited. That procedure is set out in great detail in ss 37 to 62 of the Act, which form chap 6 of the Act. Chapter 6 provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted. In this respect, chap 6 needs to be understood in contradistinction to chap 5 of the Act. Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used

[4] 2002 (4) SA 843 (CC).

to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings."

[16] In light of the above, the present case resorts under chapter 6 of the Act in that the applicant relies on the evidence of the police that the money constitutes both the proceeds of crime and has been used to commit an offence. The guilt or wrongdoing of the owners or the possessors of the property is not relevant to the proceedings. The applicant has to establish, on a balance of probabilities, that the property has been used to commit an offence or constitutes the proceeds of unlawful activities. The respondent submitted that its version raised a real and genuine dispute of fact which could not be rejected merely on the papers.[5]

[17] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*[6] it was held that:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[5] Respondent's Heads of Argument, para 4.

[6] 2008 (3) SA 371 (SCA), para 13.

[18] The essence of the first respondent's version is that he was in lawful possession of the money which he received from Atcofield on behalf of his company which was doing business in Zimbabwe. The circumstances surrounding the route that the money travelled are quite peculiar. The transaction is between two corporates or companies and the amount involved is not trivial. According to the papers, both companies are doing business relating to mining outside of South Africa even though Atcofield has its main offices in the country. The purpose of the property, according to the memorandum of understanding, was to serve as operational capital in Nyaboko and an investment for Atcofield. The former would use the property for the acquisition of trucks and trailers.

[19] The question that arises is whether the transfer of the money took place in the ordinary course of business as suggested by the respondent. In my view, it is not. The respondent received the money hundreds of kilometres away from Zimbabwe where the two companies do business. The rendezvous is at Parys in the Free State far away from Gauteng where Messrs Oelofse and Nagel reside in the very early hours of the morning of 26 November 2022. Instead of the money travelling north to Zimbabwe, it was southbound in the Free State as the respondents were arrested near Kroonstad. Companies have bank accounts and monies are ordinarily transferred amongst each other electronically for, *inter alia,* record keeping purposes.

[20] In an endeavour to prove the legitimacy of the transaction, a typed acknowledgment of receipt dated 26 November 2021 was annexed to the papers. The wording of the document gives the impression that the director of Atcofield, Mr Oelofse, was present at the alleged handover of the money at Parys; not to mention that it is unclear when was the document typed and signed by him. In his affidavit, he prays for an order that the money is returned to Nyaboko.

[21] In the respondent's written heads of argument, it was emphasised that the police officers never indicated that "*as a result of this large stack of money that was*

discovered that they had any suspicion that the monies were stolen and/or that the respondents were warned of their Constitutional rights before they divulged the damning facts of the monies being derived from illegal gold transactions. It is submitted that if the version of the police is correct the respondents would have been warned of their constitutional rights before the respondents were questioned in detail." There is no record and the papers do not say that the respondents were questioned in detail. The police version is that on finding the money and enquiring about its origin, the respondents said they sold gold in Gauteng and earned a living selling it. As they could not produce a licence for selling gold, they were arrested after offering the police a bribe.

[22] If the respondents were in lawful possession of the money which was received from Mr Nagel as alleged, surely they could have produced and shown the police the acknowledgment of receipt (annexure TM 7) received from him by the first respondent. I am unable to accept the version of the respondents and find it to be palpably implausible and so far-fetched that it deserves to be rejected merely on the papers. I, therefore, find that a dispute of fact as raised by the respondents does not exist. I also find that the amount of R1 399 000.00 was the proceeds of the offence of the illicit selling of gold, R500 000.00 of which was used in an attempt to bribe the police.

[23] Consequently, I make the following order:

1. An order is granted in terms of the provisions of section 50(1)(b) of the Prevention of Organised Crime Act 121 of 1998 (the POCA), declaring forfeit to the state R1 399 000.00 seized on 26 November 2021 and held under Kroonstad CAS 398/11/2021 (the property) which is presently subject to a preservation of property order granted by this court under the above case number on 2 June 2022.
2. In terms of section 50(6) of POCA, paragraph 5 below shall take effect 20 days after publication of a notice thereof in the Government Gazette unless an Appeal is instituted before this time in which case this order will take effect on the finalisation of the appeal.
3. The applicant as per Selina Letuka (Letuka), is hereby directed to take control of the property for purposes of this order.

4. On the date on which this order takes effect, to wit 20 days after publication in the Government Gazette, Letuka shall deposit the property into the Criminal Asset Recovery Account established under section 63 of POCA, account number […] held at the South African Reserve Bank, Vermeulen Street, Pretoria.
5. The applicant is further directed to publish a notice of this order in the Government Gazette as soon as possible.

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MHLAMBI, J

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